

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

In re Wellbutrin SR	:	Civil Action No. 2:04-cv-5525
Antitrust Litigation	:	The Honorable Lawrence F. Stengel
(Direct Purchaser Actions)	:	
	:	
Sheet Metal Workers Local 441	:	Civil Action No. 2:04-cv-5898
Health and Welfare Plan, et al.	:	The Honorable Lawrence F. Stengel
vs.	:	
GlaxoSmithKline, plc, et al.	:	
(Indirect Purchaser Actions)	:	
	:	
Medical Mutual of Ohio, Inc.,	:	Civil Action No. 2:05-CV-396
vs.	:	The Honorable Lawrence F. Stengel
GlaxoSmithKline, plc, et al.	:	
	:	

**PLAINTIFFS' RESPONSE TO GSK'S THIRD NOTICE OF
SUPPLEMENTAL AUTHORITY RELEVANT TO THE PENDING
MOTION FOR SUMMARY JUDGMENT AS TO ALL CLAIMS**

The special master's report and recommendation in *In re K-Dur Antitrust Litig.*, MDL No. 1419, 2009 WL 508869 (D. N.J. Feb. 6, 2009) is not "authority" for anything, and it is distinguishable from the facts of this case. The special master's recommendation is not authority because, under Federal Rule of Civil Procedure 53(f), a court must decide *de novo* all objections to a special master's findings of fact (absent a stipulation that the findings will be reviewed for clear error or considered final) and must decide *de novo* – in all cases – all objections to a special master's conclusions of law. As GSK admits, the special master's report and recommendation in *K-Dur* has been objected to and is currently on appeal to the district court judge. Moreover, even a decision from that court (the District of New Jersey) would have no precedential value in this case.

Even if it were valid and binding authority, the special master's opinion in *K-Dur* does not support GSK's position for the reasons outlined in Plaintiffs' earlier oppositions to GSK's motion for summary judgment as to all claims. First, unlike in *K-Dur*, the facts and circumstances that were available to the parties and the court in GSK's lawsuit against Eon are in dispute, because GSK wrongfully withheld important evidence in the underlying litigation demonstrating that GSK's litigation position was baseless.¹ Second, the special master in *K-Dur* found that the law of prosecution history estoppel was unsettled in 1995 when the *K-Dur* patent litigation was filed. *K-Dur*, 2009 WL 508869, at *6, 29. GSK's lawsuit against Eon was filed five years later, on the afternoon of November 29, 2000 – the same day that the

¹ See Direct Purchaser Class Plaintiffs' Memorandum In Opposition to GSK's Motion for Summary Judgment as to All Claims at 26; Medical Mutual of Ohio, Inc.'s Opposition to GlaxoSmithKline's Motion for Summary Judgment as to all Claims at 28-32.

Federal Circuit published its *en banc* decision in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kapushiki Co., Ltd.*, 234 F.3d 558 (Fed. Cir. 2000). The special master in *K-Dur* offered no opinion on the state of the law following the *en banc Festo* opinion. Third, regardless of how “unsettled” the law of prosecution history estoppel might have been, it was never unsettled in any way that would have worked to GSK’s advantage. GSK could not have had a realistic expectation of success on the merits under any iteration of the law of prosecution history estoppel that in fact applied or that GSK could have realistically hoped would apply upon a decision by the Supreme Court.

GSK’s footnote suggesting that a lawsuit cannot be objectively baseless when the opposing sides in a dispute offer conflicting expert opinions is not the law nor is it the holding in *K-Dur* (and is perhaps why GSK only mentions it half-heartedly in a footnote). *See In re Relafen Antitrust Litig.*, 346 F. Supp. 2d 349, 354, 363 (D. Mass. 2004) (denying summary judgment in antitrust case based on sham litigation despite SmithKline citing its expert opinion in the underlying litigation). To hold as GSK suggests would permit a party to file and pursue a totally baseless lawsuit, yet escape liability for doing so simply by producing an expert report, wholly regardless of the report’s merits. It would not matter even if the report were total nonsense or if the jury (as it is permitted to do) utterly disregarded the expert’s testimony. An expert’s opinion must pass muster. To the extent the special master believed the report in *K-Dur* had merit, such a determination is fact-specific and relevant only to

that case, which again has no precedential value – *even in the case in which it was submitted.*

Dated: November 10, 2009

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' Response to GSK's Third Notice of Supplemental Authority Relevant to the Pending Motion for Summary Judgment as to all Claims was served upon all counsel of record via ECF on this 10th day of November, 2009.

/s/

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